The second item of damages fails equally to fall within the generally accepted measure of damages. The obligation of paying a pension is placed upon the employer by operation of a statute and is analogous to the burden placed upon an employer to pay compensation to his injured employees by operation of the usual State Workman Compensation Acts. Under the New Jersey Employer's Liability Act,[17] which gives no right of subrogation, it has been held that compensation paid an injured employee could not be included in the damages granted in an action for loss of services.[18] It is submitted that this principle is correct and should have been applied in the policeman case, for it is the expressed intention of this class of statute that the employer shall bear the burden of the employee's incapacity.

The policeman case is, therefore, interesting in that it takes for granted that there is a right of action for loss of services in a case of employer and employee where there is not a shadow of the original trade or business family under which the action grew up, but is of doubtful soundness in its radical departure from the proper measure of damages.

G. R. R. Jr. and F. H. B. Jr.

THE PRIVILEGED CHARACTER OF ANTI-MARITAL TESTIMONY. —"It hath been resolved by the justices, that a wife cannot be produced either against or for her husband, *qua sunt duae animae in carne una.*"[1] Although the husband's privilege of not having his wife testify against him had been recognized previously,[2] this seems to have been the first authoritative statement of it. The true reason for the rule, however, is probably that suggested in Wigmore's Evidence,[3] namely, that the wife's act of testifying against her husband, especially in criminal cases, where she might be the means of sending him to his death, would be, in effect, but one step from the crime of petit treason. This offence was still recognized at the time the rule arose, and consisted of violence to the head of the household by a member of it, whether, wife, child or servant. But since this reason was not enunciated in any decision, Lord Coke's rather metaphysical explanation was in favor for a time. Since then, however, as has been the case with many other rules of evidence, the courts, from time to time, have not hesitated to invent new and different reasons for supporting the privilege, so as to make it fit into their respective schemes of legal philosophy. With a very few exceptions they have united in believing the rule to be a good one, and have justified and enforced

[17]Employer's Liability Act of New Jersey, Chapter 95, Laws, Session of 1911.

[18]Interstate Tel. & Tel. Co. v. Public Service Elect Co., 86 N. J. L. 26, 90 Atl. 1062 (1914).

[1]Coke on Littleton, 6b, (1628).

[2]Bent v. Allot, Cary 94 (Eng. 1580).

[3]§ 2227.

it, except where it has been modified or abolished by statute. The explanation most generally given in recent years is that the privilege, now extended to the wife as well as to the husband, is based "entirely on the ground of public policy. It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife."[4] This reason—or excuse, as it might better be called—for maintaining the privilege, as well as the others which have been advanced, was strongly attacked by Bentham,[5] and shown to be unjustifiable, unless on purely sentimental grounds. Yet, since the rule persists generally, it is perhaps better to have it supported on a pillar of mere sentiment, however weak and fallible, than, by destroying the pillar, to make of the rule a Mohammed's coffin of the law.

It is not strange that such a broad and arbitrary rule should early have been recognized as subject to some exceptions. The first of these to appear, being applicable to cases involving corporal violence inflicted by one spouse on the other, had its genesis in Lord Audley's Trial,[6] where it was resolved by the judges that "in a criminal cause like this, where the wife is the party grieved and on whom the crime is committed, she is to be admitted as witness against her husband." Many other exceptions to the general rule have arisen similarly, to meet particular conditions. So numerous are the exceptions, indeed, that the rule may fairly be said to be unfitted for general and consistent application. One might well feel justified in believing, as scientists do, that a rule subject to so many exceptions is prima facie incorrect.

The recent Pennsylvania case of Commonwealth v. Bricker[7] involves two of these exceptions, which might better be considered as questions of construction of the rule. In that case the defendant was charged with having caused the death of Sarah Feinberg by performing an abortion on her. The husband of the deceased woman was offered as a witness. It was objected that such testimony would, in effect, be testimony against his wife. It was held by the Superior Court, however, that he was a proper witness.

The first question raised by Commonwealth v. Bricker is whether or not the general rule applies where the wife (or husband, as the case may be), against whose interest the testimony of the spouse is offered, is not a party to the suit. The earlier view was that the privilege existed, especially in criminal cases, and included "evidence which may even tend to criminate the other. The objection is not confined merely to cases where the husband and wife are directly accused of any crime, but (applies) even in collateral cases."[8] This view has been taken in Pennsylvania and in

[4]Sharswood, J., in Pringle v. Pringle, 59 Pa. 281 (1868).
[5]Rationale of Judicial Evidence, book IX, part IV, chap. V, sect. IV (1827).
[6]3 How. St. Tr. 401 (Eng., 1631).
[7]74 Pa. Super. Ct. 234 (1920).
[8]Rex v. Cliviger, 2 T. R., 263 (Eng., 1788).

a number of other states.[9] It has been carried so far as to exclude a husband's testimony against one on trial for adultery with his wife, although the wife had previously been acquitted on the same charge arising out of the same particular act.[10] If the peace of the family is the true reason for the privilege, strict logic would require that it be allowed in collateral proceedings. In England, however, the courts soon repudiated their earlier view, and, together with many jurisdictions in the United States, now hold that there is no privilege in such cases.[11] The courts which refuse to allow the privilege, do not, it seems, have the courage of their convictions, since in the majority of cases they carefully explain that they only refuse it because such testimony could not be used as an instrument of further prosecution. It would be difficult to say whether or not the weight of authority supports the allowance of the privilege in collateral proceedings. The tendency appears to be toward a refusal to allow it.

In Pennsylvania the privilege is now regulated by statute,[12] and it is provided that, in criminal cases, husband and wife shall not "be competent or permitted to testify against each other." The court, in Commonwealth v. Bricker, construes this "to prohibit testimony of either party to the marriage relation so far as to incriminate the other party to the contract," even in collateral proceedings. This, in effect, makes no change in the common law view previously taken in the state.

The Superior Court, however, then proceeds to show that the rule is not applicable in Commonwealth v. Bricker, since the deceased woman was in no sense a participant in the crime. There is some conflict of authority as to whether or not a woman on whom an abortion is performed is guilty of any criminal offense in voluntarily submitting her body for the act. It seems clear that she is not a principal, unless by statute.[13] It has also been held in Pennsylvania, in accordance with the weight of authority, that she is not an accomplice or accessory, but is looked upon rather as the victim, although she herself may have solicited the act.[14] There have been several suggestions, however, and one definite adjudication, that a woman might be guilty as a party to a conspiracy to

[9]Johnson v. Watson, 157 Pa. 454, 27 Atl. 772 (1893).
State v. Welch, 26 Me. 30 (1846).
People v. Fowler, 104 Mich. 449, 62 N. W. 572 (1895).
Graves v. Harris, 117 Ga. 817, 45 S. E. 239 (1903).
[10]State v. Wilson, 31 N. J. L. 77 (1864).
[11]Rex v. All Saints, 6 M. & S. 195 (Eng. 1817).
State v. Dudley, 7 Wis. 664 (1859).
State v. Briggs, 9 R. I. 361 (1869).
State v. Bridgman, 49 Vt. 202 (1876).
[12]Act of 23 May, 1887, P. L. 158, §2(b), as amended by Act of 11 May, 1911, P. L. 269, §1.
[13]1 Corpus Juris 315.
[14]Commonwealth v. Weaver, 61 Pa. Super. Ct. 571 (1915).
Commonwealth v. Wood. 11 Gray 85 (Mass. 1858).
People v. Veeder, 98 N. Y. 630 (1885).

procure an abortion on herself.[15] This is directly contrary, in point of reasoning, to the well-recognized ruling that a man and woman cannot conspire to commit adultery with each other.[16] The ground for this is that the planning of a crime by the parties necessary to its consummation can amount to nothing more than preparation, or at most an attempt, and does not furnish the element of accession, from which the aggravation necessary to common law conspiracy may be drawn. The same principle is applicable to abortion, since the woman on whom the act is to be committed is a necessary party. The court, in Commonwealth v. Bricker, took this view, and decided that the deceased woman was not guilty of any crime in permitting anfabortion to be performed on herself. Hence testimony that she had done so could not incriminate her, with the result that the privilege could not be invoked to exclude her husband as a witness.

Another question raised by Commonwealth v. Bricker is whether or not the privilege continues after the death of one spouse, so as to bar the survivor's testimony "in disparagement of the conduct or property of the deceased." If the privilege exists in such a case, it must be in order to prevent the breaking of the marital peace of the hereafter, which seems difficult of comprehension, in view of the assurance that there "they neither marry nor are given in marriage." It has been maintained in some cases that such a post-mortem privilege exists.[17] The better and more prevalent view, however, holds that there is no privilege after the death of a spouse.[18] It seems probable that the cases supporting a post-mortem privilege, as suggested in Dean Wigmore's Evidence,[19] were so decided as a result of confusing two radically different privileges, the one as to general testimony against the conduct or property of the spouse, and the other as to confidential marital communications. It is universally conceded that the latter survives after the death of husband or wife, and because of the general similarity of the privileges, it is quite conceivable that they should have become confused. The court, in Commonwealth v. Bricker, after considering the question, followed the prevalent rule, and held the husband's testimony to be admissible on this ground also.

A. C. S.

[15]Regina v. Whitechurch, L. R. 24 Q. B. Div. 420 (Eng. 1890).
[16]Shannon v. Commonwealth, 14 Pa. 226 (1850).
Miles v. State, 58 Ala. 390 (1877).
[17]O'Connor v. Marjoribanks, 4 Man. & G. 435 (Eng., 1842).
Dickerman v. Graves, 6 Cush. 308, (Mass., 1850).
William & Mary College v. Powell, 12 Gratt. 372 (Va. 1855).
[18]Pennsylvania v. Stoops, Addison 381 (Pa. 1799).
Walker v. Sanborn, 46 Me. 470 (1859).
Jackson v. Barron, 37 N. H. 494 (1859).
[19]§2237.